No. 90-355

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,
v.
BARBARA A. LUCK,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal for the First Appellate District

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

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1. Luck inadvertently makes the case for the granting of certiorari. The Railway Labor Act mandates arbitration of all disputes arising from "agreements" between an individual "employee * * * and a carrier." 45 U.S.C. § 153, First (i). One searches the Brief in Opposition in vain for *any* argument as to why that plain language does not cover this dispute, arising from an agreement between an individual, Luck herself, and a carrier, Southern Pacific. In fact, Luck appears to concede that the statute itself, without more, fits her situation.[1]

Sidestepping the plain language of the Act, Luck simply asserts that such an interpretation would be incon-

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[1] Thus, Luck says the National Railroad Adjustment Board has held that it has no jurisdiction absent a collective bargaining agreement, "*despite* the Act's broad definition of 'employee.'" Brief in Opposition at 7 (emphasis added).

sistent with prior decisions of this Court. Far from supporting Luck's position, the cases cited merely underscore the fact that this Court has never addressed the specific issue raised here, and demonstrate the need for a decision by this Court resolving the very ambiguities in the case law which led to the erroneous state court decision below.

Virtually every decision cited by Luck *expanded* rather than narrowed the National Railroad Adjustment Board's jurisdiction and its ability to decide disputes. *See Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S. Ct. 2477 (1989) (disputes arising from drug-testing program may be subject to mandatory adjustment); *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978) (*per curiam*) (Adjustment Board's determination of timeliness may not be disturbed by District Court or Court of Appeals); *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965) (District Court may not review merits of Adjustment Board decision); *Pennsylvania R.R.* v. *Day*, 360 U.S. 548 (1959) (Adjustment Board has exclusive jurisdiction of dispute over back wages); *Union Pacific R.R.* v. *Price*, 360 U.S. 601 (1959) (precluding relitigation of issues decided by the Adjustment Board); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950) (recognizing exclusive jurisdiction of Adjustment Board with respect to certain disputes).[2] Yet Luck anomolously argues that in those cases this Court adopted a "narrow interpretation of the term 'agreements'" and, implicitly, ignored the Act's plain language.[3] The cases contain no such holding.

Luck's argument rests on statements by this Court that the Act's mandatory adjustment procedures cover

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[2] The only arguable exception is *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957), in which this Court held that a District Court may order injunctive relief under the Norris-LaGuardia Act "to vindicate the processes of the Railway Labor Act." *Id.* at 41.

[3] Brief in Opposition at 5.

disputes concerning interpretation of collective bargaining agreements. However, the Court addressed collective bargaining agreements because those were the agreements before the Court. Nowhere in those cases did this Court suggest that the Adjustment Board's jurisdiction under the Act is limited to such disputes. This Court should grant certiorari and make explicit what should already be clear from the language of the Act itself: that the mandatory adjustment procedures in the Act apply to all railway employees, whether they are represented by a union or not.

2. As shown in our Petition for Writ of Certiorari ("Petition"), the plain language of the Act applies, and there is thus no need for reliance on legislative history here.[4] Even if such history were relevant, however, Luck makes almost no attempt to refute Southern Pacific's argument that the Act's legislative history compels reversal of the California Court of Appeal. Luck's discussion of that issue (relegated to a footnote) raises three points which are easily dismissed.

First, Luck contends that "the views expressed are those of only one legislator."[5] In fact, Senator Wheeler, a member of the Committee on Interstate Commerce, stated that the view cited was shared "by all the members of the committee," *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)*, 93d Cong., 2d Sess. 691 (1974) ("Legislative History"), and the view was repeated by several Senators in debate just prior to adoption of the Act.[6] Second, Luck's argument that it is unclear whether the debate concerned employees not represented by unions[7] is contradicted by clear statements from the Senate floor that the adjustment

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[4] *See* Petition at 8.

[5] Brief in Opposition at 8 n.3.

[6] *See* Petition at 12-13.

[7] Brief in Opposition at 8 n.3.

procedures would apply "to *every employee* working for the carrier" (Senator King), including "all classes and groups and individuals" (Senator Watson). Legislative History at 690-691 (emphasis added).

Finally, Luck argues that at the time of the Senate debates, the adjustment procedures under the Act were not compulsory. But even if that were true—which we do not concede—it is simply irrelevant to the inquiry here. This case concerns the interpretation of specific statutory language which has remained essentially unchanged since the Railway Labor Act was adopted in 1926. When the provision at issue was enacted, it was clear that the legislature intended the adjustment procedures to apply to all employees, including employees not represented by unions. Neither the 1934 amendment to the Act, nor any subsequent amendment, has changed the scope of the relevant statutory language or its meaning.[8]

As for the Adjustment Board's apparently narrow interpretation of its jurisdiction, that is a reason for granting certiorari, not denying it. This will not be the first time a federal agency has ignored the plain language of a governing statute and misinterpreted its own jurisdiction.[9]

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[8] Luck contends that *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972), held that the Act's adjustment procedures were mandatory "*only for* 'disputes over the interpretation of a collective bargaining agreement.'" Brief in Opposition at 8 (emphasis added). Of course, *Andrews* held nothing of the sort. Although the dispute at issue in *Andrews* involved interpretation of a collective bargaining agreement, the Court in no way held that the mandatory procedures were *limited* to disputes arising out of such agreements. That state court litigants such as Luck may find the decision susceptible to such an interpretation provides a persuasive reason to grant the Petition in this case.

[9] *See Louisville Cement Co.* v. *ICC*, 246 U.S. 638, 644 (1918) ("the interpretation which the Commission placed upon its jurisdictional power is erroneous"); *see also Public Employees Retirement Sys.* v. *Betts*, —— U.S. ——, ——, 109 S. Ct. 2854, 2863 (1989) ("no deference is due to agency interpretations at odds with

3. Federal case law supports the position that the Railway Labor Act preempts wrongful discharge claims filed by employees not represented by a union. Luck's attempt to square this federal authority with the decisions of the California Court of Appeal and other state courts is unpersuasive.[10]

Luck first asserts that *Thomas* v. *New York, Chicago & St. Louis R.R.*, 185 F.2d 614 (6th Cir. 1950), is inapposite because "[n]o issue of preemption was involved."[11] The issue of preemption was not addressed there, however, simply because the court was concerned with whether the National Railroad Adjustment Board had the authority to consider a wrongful discharge claim. Any judicial decision that defines the scope of the Board's jurisdiction, as did *Thomas*, necessarily describes those employee claims preempted by the Act.

Luck further argues that *Thomas* does not support petitioner's position because the Sixth Circuit "did not make clear whether the employee was simply a non-union member in a union-represented bargaining unit or whether, like Luck, he was an exempt employee not subject to a union contract."[12] The *Thomas* court's failure to make this specification, however, is irrelevant. The court indicated that the discharged employee could not "rely upon any union contract as to duration or tenure of employment." 185 F.2d at 617. Therefore, the wrongful discharge claim

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the plain language of the statute itself"); *Patterson* v. *Chicago & Eastern Illinois R.R.*, 50 F. Supp. 334 (N.D. Ill. 1943) (requiring Adjustment Board to take jurisdiction of dispute involving non-union employee).

[10] The California Court of Appeal recognized what it called "conflicting federal authority" on this issue, thereby conceding that its holding was contrary to the decisions of at least some federal courts. *See* Petition at App. 50a.

[11] Brief in Opposition at 9.

[12] Brief in Opposition at 9.

held in *Thomas* to be within the Board's jurisdiction clearly did not arise out of a collective bargaining agreement.

Luck is similarly unsuccessful in distinguishing *Womble* v. *Seaboard System R.R.*, 804 F.2d 635 (11th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987). Luck concedes that in *Womble*, the court relied upon *Thomas* in holding that a wrongful discharge claim brought by a non-union employee is preempted by the Act. Luck merely asserts, without explanation, that this reliance upon *Thomas* counts for little because the Eleventh Circuit also cited two cases involving "unionized employees covered by union contracts." [13]

Finally, Luck contends that *Hodges* v. *Atchison, T. & S.F. Ry.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984), is inapposite because the discharged employee in that case was represented by a union. Again, the claimant's inclusion in a collective bargaining unit is irrelevant because, as Luck, he was alleging a "breach of an employment agreement and not the collective bargaining agreement itself." *Id.* at 417.[14]

In short, those federal cases that have addressed the issue have held that the wrongful discharge claims of railroad employees are subject to adjustment and arbitration regardless of whether such claims arise out of a

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[13] Brief in Opposition at 9.

[14] The Tenth Circuit stated in *dicta* that "Mr. Hodges' employment in the craft governed by the applicable collective bargaining agreement makes him subject to the terms and conditions of employment obtained in the agreement * * *." 728 F.2d at 417. However, the court did not hold that Hodges' wrongful discharge claim arose from the collective bargaining agreement. The court could not have reached such a decision without addressing the merits of Hodges' claim. The court left it to the National Railroad Adjustment Board to resolve the contractual dispute, regardless of whether it ultimately was found to have arisen from an individual employment contract or a collective bargaining agreement.

collective bargaining agreement. Luck has not cited a single federal case squarely holding that wrongful discharge claims arising out of individual employment contracts are outside the ambit of the Railway Labor Act. Moreover, to the extent that she has identified ambiguity in federal decisions relied upon by petitioner, Luck has highlighted the necessity that certiorari be granted.[15]

4. Luck argues that this case "fall[s] within an exception to preemption developed by this Court for actions which seek to enforce minimum substantive guarantees provided to *all* employees." [16] That argument is wrongheaded.

Two of the cases cited by Luck merely held that an employee seeking to enforce a statutory *right of action* could, in some circumstances, bring such a suit outside of the Adjustment Board. *See Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987) (Federal Employers' Liability Act); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act). That is not the case here. In fact, the California Court of Appeal expressly *declined* to find a right of action in the California Constitution's privacy provision on which Luck relies.[17] Rather, the cause of action on

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[15] Luck asserts that two recent decisions by this Court have cast doubt upon the continued validity of the *dictum* from *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711 (1945), which states that the Board has jurisdiction over claims unrelated to the collective bargaining agreement. Nothing could be further from the truth. As explained below, *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987), simply held that FELA claims are not preempted by the Railway Labor Act. In *Consolidated Rail Corp.* v. *Railway Labor Executives' Association*, —— U.S. ——, 109 S. Ct. 2477 (1989), the Court obviously did not discredit *Burley*, a decision it cited with approval four times and quoted from at length. *Consolidated Rail*, like other cases cited at point 1 herein, expanded the National Railroad Adjustment Board's jurisdiction and its ability to decide disputes.

[16] Brief in Opposition at 11 (emphasis in original).

[17] *See* Petition at App. 29a-33a.

which Luck recovered was nothing more than a common law breach of implied contract claim—precisely the type of claim which this Court has held to be subject to the Act.

The other case cited by Luck, *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. 399 (1988), involved Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), which is expressly limited to suits "for violation of contracts *between an employer and a labor organization* representing employees." 29 U.S.C. § 185(a) (emphasis added). The Court's decision was grounded not upon an "exception" to preemption, but upon the fact that the dispute in that case did not require interpretation of a collective bargaining agreement.[18] That statute, unlike the one here, specifically referred to contracts between employers and labor unions—*i.e.*, collective bargaining agreements. That statute and the *Lingle* case, rather than supporting a denial of certiorari, demonstrate that Congress knows how to use restrictive language in describing agreements. It chose not to do so here.

Luck's argument comes down to the proposition that any time an employee alleges a violation of an amorphous "right to privacy," he or she can bypass the mandatory arbitration provisions of the Railway Labor Act. The same argument presumably would apply to those operat-

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[18] The United States Court of Appeals for the Ninth Circuit has recently rejected the argument that under *Lingle*, a claim based on California's privacy right is excepted from preemption under Section 301, holding such a claim to be "completely preempted under section 301 and properly dismissed on the merits." *See Stikes* v. *Chevron USA, Inc.*, —— F.2d ——, ——, Daily Lab. Rep. (BNA) No. 188, at E-1, E-3 (9th Cir. 1990); *see also Utility Workers of America* v. *Southern California Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1530 (1989) ("Drug testing does not implicate the sort of 'nonnegotiable state law rights' that preclude preemption under section 301.").

ing under collective bargaining agreements, since Luck casts the "exception" as a broad one to "preemption." [19] This most extraordinary "exception" has never been established by this Court, and Luck's argument in favor of it is another reason why certiorari is warranted.[20]

5. Luck's contention that Southern Pacific's "conduct amounted to a repudiation of the [Act's] administrative procedures" because Southern Pacific correctly stated that no "written grievance procedures" existed within the company is absurd.[21] That statement in no way "estops" Southern Pacific from relying on the mandatory adjustment procedures established by federal statute. In any event, this issue was not decided below and has no bearing on whether the Petition should be granted.

6. Finally, Luck claims that the case is limited by its unique facts. On the contrary, there are no unique facts. The decision below will affect thousands of workers not directly covered by collective bargaining agreements, in an industry where drug-testing is of immediate and

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[19] Brief in Opposition at 11.

[20] The three state court cases cited by Luck do not support her contention that certiorari should be denied. Two of the cases, *Evans* v. *Southern Pacific Transportation Co.*, 213 Cal. App. 3d 1378, 262 Cal. Rptr. 416 (1989), *cert. denied*, 110 S. Ct. 3213 (1990), and *Quinn* v. *Southern Pacific Transportation Co.*, 76 Or. App. 617, 711 P.2d 139 (1985), involved claims based on specific statutory causes of action. The other state court case, *Hollars* v. *Southern Pacific Transportation Co.*, 792 P.2d 1146 (N.M. App. 1989), *cert. quashed*, —— N.M. —— (1990), held that the analysis under *Lingle* applied to Section 3 First of the Railway Labor Act. Like the California Court of Appeal's decision in the instant case, *Hollars*' holding that the mandatory adjustment procedures under the Act were limited to disputes arising only under collective bargaining agreements—in contrast to the federal courts and in conflict with the plain language and legislative history of the Act—calls for this Court to grant certiorari and resolve this issue.

[21] Brief in Opposition at 13.

serious concern both to management and to the public and where uniformity is of paramount importance.[22]

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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[22] *See Roane* v. *Comair, Inc.*, 708 F. Supp. 802, 806 (E.D. Ky. 1989) ("A national policy is required to deal with the problem [of drugs in the workplace]. It is essential that this policy be uniform and uniformly applied. This is particularly true as to the rights and duties of * * * railroads * * * which operate across state lines and which are responsible for the safety of millions.").